IN THE

# United States

# Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

McGOLDRICK LUMBER COMPANY, a corporation,

Appellant,

vs.

CHARLES J. KINSOLVING and JANE DOE KINSOLVING, whose real name is unknown, his wife, and MILWAUKEE LUMBER COMPANY, a corporation, LYNN LUNDQUIST and ELIX LINDQUIST,

Appellees.

NO. 2429

BRIEF OF APPELLEES.

KINSOLVING AND MILWAUKEE LUMBER COMPANY.

J. H. FORNEY,
FRANK L. MOORE,
R. B. NORRIS,
Attorneys for Appellees.

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## BRIEF OF APPELLEES.

### STATEMENT OF THE CASE.

The appellees, Kinsolving and the Milwaukee Lumber Company, a corporation, desire to supplement appellant's statement of facts, found in its brief from pages 1 to 6, as follows:

Patent to the lands in controversy, issued to the Santa Fe Pacific R. R. Co., March 27, 1911, and was

received at the United States Land Office, at Coeur d'Alene, Idaho, on April 5, 1911, and the same was recorded in the office of the Recorder of Shoshone County, Idaho, on September 29, 1911. (Transcript pages 272-274, Plaintiff's Ex. 5.)

Prior to that time, and on the 10th day of January, 1906, the patentee had executed two powers of attorney, authorizing and empowering the defendant, C. J. Kinsolving, "To convey by quitclaim deed all the right, title, interest, and claim" which the Santa Fe Pacific Railroad Company has, or may hereafter, acquire in lands selected or located. (Trans. pages 265-271, Plaintiff's Ex. 3 and 4.)

On the 15th day of September, A. D. 1911, Kinsolving, as attorney-in-fact, for the Santa Fe Railroad Company, executed, and on the 27th day of September following, acknowledged and delivered to the appellee, Milwaukee Lumber Company, a quitclaim deed, conveying the lands and premises in controversy to appellee, Milwaukee Lumber Company. (Trans. pages 262-264, Plaintiff's Ex. 2.)

The consideration of this conveyance was TWELVE THOUSAND ($12,000.00) DOLLARS, and as payment thereof, the Milwaukee Lumber Company made and delivered its agreement to pay to Kinsolving, the sum of TWELVE THOUSAND ($12,000.00) DOLLARS on certain terms and conditions. (Trans pages 261-262, Plaintiff's Ex. 1).

All of these instruments, excepting the last mentioned, were filed in the office of the Recorder of Sho-

shone County, Idaho, where the lands in controversy are located, on the 29th day of September, 1911.

On October 9, 1911, the complainant filed its Bill of Complaint in the Circuit Court of the United States, for the Ninth Circuit, District of Idaho, Northern Division. (Trans. pages 1-129).

Thereafter, and on the 16th day of October, 1913, complainant filed an amended and supplemental Bill of Complaint, and thereon procured a restraining order, restraining the defendants, and each of them, from cutting and removing any timber from the land, or from logging the same, or from committing acts of waste thereon. (Trans. pages 129-140.)

The appellees Kinsolving and Milwaukee Lumber Company, joined in a demurrer to the Bill of Complaint, which was filed in the lower court December 4, 1911. (Trans. pages 142-145.)

This demurrer was presented to the court, and on September 6, 1912, the Honorable District Judge, filed his opinion thereon. (Trans. pages 146-147.)

An order overruling this demurrer without prejudice, was entered on the 7th day of September, 1912, and the appellees were given time to answer, (Trans. page 147) and their answer was filed October 5, 1912. (Trans. pages 148-206.) The answer proper ends at page 190, the remaining pages being exhibits as follows: the patent, powers of attorney; deed to the appellee, Milwaukee Lumber Company, and a contract between the appellee Milwaukee Lumber Company

and the defendants Lindquist and Lundquist.

The answer raises several issues of fact, among which are:

(a) The bona fides of the entryman Shannon, when he made his application to purchase the lands and premises involved, on the 26th day of November, 1906. That the timber and stone entry No. 2500, issued to him upon his payment to the government of the purchase price of said lands, was procured by fraud upon the part of the said John Shannon, and was wholly and entirely void, and that Shannon made said application to purchase said lands for speculative purposes, all of which was at all times known to the complainant. (Trans. pages 152-155, paragraph V.)

(b) That neither the complainant nor Roy C. Lammers, agent of the complainant, ever acquired any title to, or interest in, the said lands and premises, either in law or in equity; that it was not then, nor had it ever been entitled to the possession thereof, and is not entitled to receive or hold any legal title thereto. (Trans. page 155, paragraph VI.)

(c) That the complainant was not a bona fide purchaser of said lands and premises for value, or at all, and that it purchased with full knowledge of the fraudulent practices of the entryman Shannon, and at all times knew that said Shannon had, prior to the time he made application for the purchase of said land on the 26th day of September, 1906, made a contract with one William McCarter, whereby he, Mc-

Carter, was to acquire an interest in the lands and premises to which the said Shannon expected to acquire title, by virtue of said application of purchase. (Trans. page 156, paragraph VII.)

The answer also sets forth the transactions between the Santa Fe Pacific Railroad Company and the appellee, The Milwaukee Lumber Company, (Trans. pages 172-176, paragraphs XV-XVIII.)

Thereafter the cause was called for trial, and certain witnesses were called, and oral testimony and documentary evidence was offered and received in evidence. (Trans. pages 232-287.) The cause was submitted, and thereafter, and on February 6, 1914, the Honorable District Judge made and filed his decision in the lower court. (Trans. pages 224-230.) and thereafter and on the 9th day of March, 1914, judgment of dismissal was duly given, made and entered in said cause in said court, dismissing the complainant's suit. (Trans. page 231).

## POINTS AND AUTHORITIES

### I.

The Land Departent, including the Secretary of the Interior, the Commissioner of the General Land Office, and all their subordinate officers, constitute a tribunal created by Congress for the purpose of disposing of, and conveying the legal title to, the public lands, to individuals. As such it is vested with jurisdiction to hear and determine all questions of fact that

may arise in any controversy respecting rights claimed by any person, under any laws of the United States, to receive a patent for any public land, and its decisions, upon all matters of fact in the absence of fraud, are conclusive everywhere.

Johnson vs. Towsley, 13 Wall. 72.

Shepley vs. Cowan, 91 U. S. 330.

Marquez vs. Frisbie, 101 U. S. 473.

Vance vs. Burbank, 101 U. S. 514.

Baldwin vs. Stark, 107 U. S. 463.

De Cambra vs. Rogers, 189 U. S. 119.

Greenameyer vs. Coalt, 212 U. S. 434.

Whitcomb vs. White, 214 U. S. 13.

Emmons vs. U. S. 175 Fed. 515.

McKenna vs. Atherton, 160 Fed. 547.

American Mortgage Co. vs. Hopper, 64 Fed. 553.

II.

Where the Land Department cancels an entry by an entryman, after issuance to him of a final certificate of payment, on the ground that the entry was fraudulent, and issues a patent to another, the burden is on such entryman, or those claiming under him, in an action to recover the land of such patentee, to show that the department erred in adjudging the title to defendant, and that plaintiff was entitled to a patent, by proof that the entry was valid as against the government.

American Mortgage Co. vs. Hopper, 64 Fed. 553.

III.

In exercising this jurisdiction the officers of the Land Department are not confined to the issue raised by the parties to the proceedings before them, but may exercise that just supervision with which the law vests the department over all proceedings instituted to acquire title to portions of the public lands.

Lee vs. Johnson, 115 U. S. 48.
De Cambra vs. Rogers, 189 U. S. 119.
Bailey vs. Sanders, 228 U. S. 603.

IV.

The Courts cannot exercise any direct appellate jurisdiction over the rulings or judgments of the officers of the Land Department.

Quinby vs. Conlan, 104 U. S. 420.

V.

For mere errors in practice or of judgment, upon a weight of evidence, in a contested case, by officers of the Land Department, the remedy is by appeal from one officer of the Department to another, generally ending with the Secretary of the Interior, although under special circumstances appeal may be made to the President.

Johnson vs. Towsley, 13 Wall. 72.
Shepley vs. Cowan, 91 U. S. 330.
De Cambra vs. Rogers, 189 U. S. 119.

VI.

There can be no bona-fide purchaser or transferee

of an entryman until after the issue of the United States Patent.

Hawley vs. Diller, 178 U. S. 476.

American Mortgage Co. vs. Hopper, 64 Fed. 553.

VII.

The Courts are bound by all procedure in or before the Land Department not prohibited by law.

Johnson vs. Towsley, 13 Wall. 72.

VIII.

Equitable relief may be invoked only in cases where the complainant has suffered through fraud or where the officers of the Land Department have misconstrued the law or have misapplied the law to the facts found.

Johnson vs. Towsley, 13 Wall. 72.

Warren vs. Van Brunt, 19 Wall. 646.

Moore vs. Robbins, 96 U. S. 530.

Marquez vs. Frisbie, 101 U. S. 473.

Quinby vs. Conlan, 104 U. S. 420.

Smelting Co. vs. Kemp, 104 U. S. 636.

IX.

Courts will not review a decision of the United States Land Department on the ground that the evidence was insufficient, or that only incompetent evidence was before it, as the power of the Department to try questions of fact, embraces the power to pass on the weight and competency of the evidence.

Johnson vs. Towsley, 13 Wall. 72.

Shepley vs. Cowan, 91 U. S. 330.
De Cambra vs. Rogers, 189 U. S. 119.
Greenameyer vs. Coat, 212 U. S. 434.
Wiseman vs. Eastman, 57 Pac. Rep. 398.
Parsons vs. Venzke, 61 N. W. Rep. 1036.

X.

Exhibit "A" for identification to the testimony before Receiver, the agreement dated Sept. 24, 1906, between John Shannon and William McCartor, found on page 98 of the transcript was admissible in evidence, under the laws of Idaho, without further proof of the execution of the writing by Shannon.

Revised Codes of Idaho, Sections 3131-3149-3153-3157-5998, which are as follows:

"Same: Form.

Sec. 3131. The certificate of acknowledgment, unless it is otherwise in this chapter provided, must be substantially in the following form:

State of Idaho, County of....., ss.

On this.....day of....., in the year of....., before me (here insert the name and quality of the officer), personally appeared..... ....., known to me (or proved to me on the oath of.....), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or they) executed the same."

"What May Be Recorded.

Sec. 3149. Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter."

"Acknowledgment Necessary to Authorize Record.

Sec. 3153.. Before an instrument may be recorded, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary, or proved, and the acknowledgment or proof certified in the manner prescribed by Chapter 3 of this Title: Provided, That if such instrument shall have been executed and acknowledged in any other State or Territory of the United States, or in any foreign country, according to the laws of the State, Territory or country wherein such acknowledgment was taken, the same shall be entitled to record, and a certificate of acknowledgment indorsed upon or attached to any such instrument purporting to have been made in any such State, Territory or foreign country, shall be prima facie sufficient to entitle the same to such record."

"When Deemed Recorded.

Sec. 3157. An instrument is deemed to be recorded when, being duly acknowledged, or proved and certified, it is deposited in the recorder's office with the proper officer for record."

"Certified Copies of Deeds, Etc.

Sec. 5998. Every instrument conveying or affect-

ing real property, acknowledged or proved, and certified, as provided by law, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may also be read in evidence, with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy."

XI.

The forbidden agreement entered into between Shannon and McCartor, (Transcript page 98, Exhibit "A" for identification to testimony before Receiver) ended the right of the entryman Shannon to further proceed to acquire title to the land in controversy.

Bailey vs. Sanders, 228 U. S. 603.

## ARGUMENT.

It is the contention of the appellees, Kinsolving and The Milwaukee Lumber Company, a corporation, that the only issues that can be raised in a suit of this nature, (a suit to have The Milwaukee Lumber Company declared a trustee of the legal title to the lands in controversy for the use and benefit of the complainant) are issues of law, and that the only real issue which was before the lower court, and the only issue now before this court, is an issue of law, predicated upon an entire absence or want of evidence to support the decision of the Commissioner of the General

Land Office, that the application of the entryman Shannon, made before the officers of the Local U. S. Land Office, at Coeur d'Alene, Idaho, on the 26th day of September, 1906, was made for speculative purposes, and not for his own use and benefit.

The appellant, in its brief, at pages 6 and 7, specifies seven errors in the rulings of the trial court, upon the admissibility of evidence. We are of the opinion that all of this evidence was cumulative, and was not necessary, but the trial judge in his opinion upon our demurrer, (Trans. page 146), had held that because,

> "Under the construction placed upon the timber and stone act in the Williamson case, (207 U. S. 425), decided after the action of the Land Department here complained of, had been taken, it must be held that the evidence of fraud adduced in the contest is at best but remotely circumstantial and extremely meager, and, upon the other hand the circumstances are sufficient at least to raise a suspicion of fraud."
>
> (His honor was in error in this, see Decision of District Court, Transcript, pages 227-228, beginning with last paragraph of page 227,)

and overruled our demurrer without prejudice to urge the point upon the final hearing, and the order overruling the demurrer, (Trans. page 147), was without prejudice. We then answered and offered this cumulative evidence as circumstantial evidence to establish facts from which fraud might be presumed.

After trial the points raised by demurrer were again urged by appellees and the Honorable District Judge

took the position that the only issues necessary for him to decide were raised by our demurrer. In his decision, (Trans. page 224,) he says:

> "In overruling the demurrer to the compaint without prejudice to the further consideration of the points urged, it was hoped from the answer, and the evidence to be adduced, a measure of light might be thrown upon the perplexing questions presented by the record in the Land Office. But it now turns out that with unimportant exceptions, a complete copy of this record was exhibited, together with the bill and the evidence since taken lends little, if any, assistance. Consequently the questions still are substantially those raised by the demurrer."

With a like view of the case we desire to discuss the evidence upon which the Commissioner of the General Land Office cancelled "Timber and Stone Entry No. 2500," issued to John Shannon upon his application to purchase the lands in controversy.

The decision of the Register and Receiver, found in the transcript at page 116, the opinion of the Assistant Commissioner of the General Land Office, found in the transcript at page 124, and the decision of the First Assistant Secretary of the Interior, found in the transcript at page 127, will be of great assistance to the court in determining the weight of the evidence as it was considered by these officers. They appear to have taken the position that the written agreement, dated September 24, 1906, (Trans. page 98, Ex. "A" for identification), whereby Shannon the entryman agreed to convey to McCarter an undivided

one-half interest in and to the lands sought to be purchased, when he had submitted final proof, and received the Receiver's receipt therefor, was incompetent testimony under any of the allegations of the affidavit of contest, and this is the first contention of the appellant made in its brief, (~~Transcript~~ Brief page 13).

The fallacy of this position is readily apparent, when we seriously consider the provisions of Subdivision 2 of the Timber and Stone Act, under which Shannon's application was made. By the terms of that act any direct or indirect agreement or contract made prior to filing an application to purchase, whereby the title to land, which the applicant is about to acquire from the United States, is to inure, in whole or in part, to the benefit of any person, other than the applicant, is prohibited, and the existence of such contract at the time of making application renders all proceedings before the Land Department upon such application, null and void. It is our contention that this agreement, (Trans. page 98-99) is clearly within the inhibition of Subdivision 2 of the Timber and Stone Act. Otherwise, by following the very course which Shannon did, in his attempts to acquire title to the land in controversy the object of Subdivision 2 of the Act of June 3, 1878, could be evaded with impunity.

How easy it would be for instance, for "A" to make a homestead entry upon timber land, just as Shannon did, and then make an agreement with "B" that if he,

"B," would advance or loan to him, "A," money, that he, "A," would repay "B" by conveying to him, "B," an interest in the lands and premises covered by such homestead entry, as soon as he made final proof. Then, if immediately after making this agreement, by which he had procured a loan of money, "A" should relinquish his homestead entry and file an application under the Timber and Stone Act, for the purchase of the same land, and after acquiring title to the land by paying the purchase price which he had secured as a loan by virtue of the agreement, he, "A," could convey, if he so desired, to "B," according to the terms of the agreement between them.

The money advanced by "B" to "A" under this agreement to convey, might have been used by "A" for purposes connected with the acquisition of title, or for any other purpose, but whatever the purpose there is a written and acknowledged contract between "A" and "B" made prior to "A's" application to purchase the land from the United States, whereby "B" is to acquire an interest in the land.

It is true that this contract between Shannon and McCarter could not be enforced had Shannon acquired title to the land, because the contract was prohibited by the provisions of the Act of June 3, 1878. It certainly was an express contract by which Shannon agreed to convey to McCarter a one-half interest in the lands and premises in controversy. It was entered into between the parties, or made by Shannon on the 24th day of September, 1906, prior to the time

he made application to purchase the lands in controversy, which was September 26, 1906.

We feel that counsel for appellant have fallen into an error in this, that they connect the prohibited contract between Shannon and McCarter with Shannon's homestead entry, rather than with the land in controversy. In subdivision A on page 13 of their brief, counsel say:

> "That this contract shows upon its face that it has no reference to the Timber and Stone entry, but refers entirely to the homestead entry."

Our contention is that the contract has no relation whatever to either the homestead entry or the application to purchase under the Timber and Stone Act, except that it is a contract prohibited by the provisions of the Timber and Stone Act, because it is made prior to the time Shannon made his application to purchase under the Timber and Stone Act; that it does relate to the lands to which Shannon attempted to acquire title under the Timber and Stone Act, and that it would make no difference whatever whether the land was identified by referring to the homestead entry, or the Timber and Stone application. The land is the same; the contract relates to the land; the land is specifically described in the contract; it is a written contract, executed with all of the formalities of a deed of conveyance of real estate. It is an express contract, and under its terms the title to an undivided one-half interest therein was to directly inure to the benefit of McCarter, after Shannon should acquire

title from the United States.

Had this contract been valid, under the Homestead Laws and under the Timber and Stone Act, and had Shannon, after failing to acquire title under the Homestead laws, as he did fail, proceeded to acquire title under the Timber and Stone Act, there can be no question, but that the contract could have been enforced by McCarter, regardless of the fact that the time when Shannon was to perform his part of the contract was fixed as, "As soon as he, the said party of the first part, makes final homestead proof of the lands and premises, and receives his Receiver's receipt therefor."

We, therefore, most respectfully submit that Shannon was not entitled to a Patent for the land in controversy, because of this contract he had entered into with McCarter, prior to his making the application to purchase under the Timber and Stone Act, and it makes no difference whether the contract was enforceable in a court of equity or not. It makes no difference whether Shannon intended to carry out the terms of the contract or not. It makes no difference whether or not, after he had made his application to purchase under the Timber and Stone Act, it was a prohibited contract under the Act of Congress, by which he was endeavoring to purchase the land in controversy from the United States, and it should have been considered by the officers of the Land Department when the contest was before them.

The contention of the appellant upon this issue, if followed by a court of equity, would make the provisions of the Timber and Stone Act, prohibiting contracts of this very character so ineffective that the very object of Congress in passing the act would be defeated, and its attempt to prohibit speculation in the public lands futile.

Counsel also make the objection at Subdivision B on page 15 of their brief, that the evidence does not show that this was Shannon's contract. We do not know upon what ground the Register and Receiver refused to admit the certified copy of this contract in evidence, but the objections made when it was offered, are found on page 35 of the transcript, beginning with the words, "By Mr. Dudley" and we most respectfully submit that none of the objections there found were well taken under the rules of evidence prescribed by the laws of Idaho, set forth under Points and Authorities No. X. This Exhibit offered was a certified copy of the record of an instrument, affecting real property, which showed upon its face that it had been acknowledged and certified as provided by law, and recorded in the office of the Recorder of Shoshone County, where the lands in controversy are situated, and it there appeared that the original was not in the possession or under the control of the party producing the certified copy, for the reason that the presumption would naturally follow that after the execution and the delivery of the instrument to McCarter, it would remain in his possession until evidence

to the contrary had been introduced, and if it was material it was competent without further proof of its execution by Shannon. It is true that the Register and Receiver and the Commissioner of the General Land Office, do not base their decisions upon this contract between Shannon and McCartor, but we feel that the court should take into consideration this contract, and construe it and consider it with the Act of June 3, 1878.

As above stated, the main contention of appellant is, that there was no evidence in the record to support the findings of the officers of the Land Department that Shannon made application to purchase the land in controversy for speculative purposes. In addition to the points made by these several officers and discussed by them in their several decisions, we desire to call the attention of the court to matters in the record, which these officers, under the rules laid down in Lee vs. Johnson and Bailey vs. Sanders, supra, were authorized and empowered to consider.

Shannon made a homestead entry upon these lands and premises, and made no effort whatever to make any improvements thereon, or to cultivate the same. He made application to commute this homestead entry, and after having been upon the land for the period of fourteen months he had made no effort to make that meager cultivation required of the entryman under the homestead laws. In his proof in the local Land Office, on the 16th day of January, 1907,

upon his application to purchase under the Timber and Stone Act, these questions are asked Mr. Shannon. (Record page 276).

Q. 4 Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

A. Yes, sir, all over it thoroughly.

Q. 5 When and in what manner was such inspection made?

A. About 15 or 16 days ago. I examined it thoroughly on foot.

Q. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

A. No, there are no improvements. Very little. There is just a cabin on it. That is all the improvements on the land? Yes. Whose cabin is that? It is mine.

Q. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

A. If the timber were removed it could not be cultivated.

Q. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

A. Because I don't think it is good for anything else.

If these answers are true, why had Shannon made a homestead entry upon the land something over fourteen months before, and why was he trying to acquire title to this land by purchasing the same for

$1.25 per acre under commuted homestead proof? The thought forciably suggests itself to us that he and McCarter had entered into a conspiracy to acquire title to this land under the Timber and Stone Act, and that McCarter was to receive a one-half interest in the land, by advancing to Shannon the moneys necessary to enable him to acquire title.

Taking these questions and answers into consideration, the officers of the Land Department were justified in the conclusion that when Shannon made his homestead entry upon this land he never intended to comply with the homestead laws, because he had not inspected or examined the land thoroughly during the time he had held it under his homestead entry, and during that period, which was at least fourteen months, he made no effort to make any improvements. Then following the fact that immediately after he proved up he deeded this land to Joseph H. Johnson, and when he and Johnson sold the land to the appellant he, Shannon, received only about one-half of the purchase price, or Four Thousand ($4000.00) Dollars, and one-fourth of that, or One Thousand ($1000.00) Dollars was held by the purchaser, pending the issuance of patent, and the efforts made by the appellant and its attorneys, to make the transactions between Shannon and McCarter, and Shannon and Johnson, and Johnson and McLaren, appear legal and ordinary by the affidavits prepared, (Trans. page 104 Exhibit "D" to testimony before Receiver). Affidavit of John Shannon, (Trans. page 106, Exhibit "E" to

testimony before Receiver). Affidavit of Joseph H. Johnson, (Trans. page 93-98), testimony of F. M. Dudley, (Trans. page 100, Ex. "B," to testimony before Receiver). Affidavit of William McCarter, prepared by F. M. Dudley for McCarter's signature. We desire to call the court's attention to an error in the record, at page 103. It there appears that William McCarter signed the affidavit, Exhibit "B." This is an error, see letter dated June 11, 1907 to S. L. McFarland, Esquire, St. Maries, Idaho, written by Mr. F. M. Dudley, and in connection with this, see the testimony of Mr. Dudley on cross examination, beginning on page 97 of the transcript, we say the officers of the Land Department were justified in their findings that Shannon took the land for speculative purposes, and that the circumstances which made his application come within the inhibition of Subdivision 2 of the Act of June 3, 1878, with his relations with Johnson, prior to his making application to purchase.

Further, we call the court's attention to the cross examination of the claimant in connection with the direct examination, when he made proof, under his application to purchase, (Record page 279), and particularly to questions 6, 7, 8, and 12, and applicant's answers thereto, and consider the same in connection with the fact that this applicant Shannon, had more than year prior to that time made homestead entry upon this land, and in the September preceding had undertaken to commute and acquire title by paying the minimum price of $1.25 per acre. Then consider

questions 16, 17,, and 18, and applicant's answers thereto, and compare the same with his testimony given upon the contest, (Trans. page 58 and 59), and the court cannot avoid the conclusion that Shannon did not have the money with which to purchase this land when he made his application to purchase on September 26, 1906, and in view of the fact that shortly after he made his proof and received his certificate of purchase, on January 16, 1907, he conveyed the land to Joseph H. Johnson, (Trans. page67), to secure the payment of an unknown amount of money, the conclusion naturally follows that Johnson furnished the money, and taking into consideration the further fact that he had been living with Johnson, at his hotel, and had been a patron of Johnson's saloon for some time before he had made his application to purchase, and was impecunious, and without means to make the purchase, we say that it is no stretch of the imagination to arrive at the conclusion, as the officers of the Land Department did, that there was some arrangement between Shannon and Johnson prior to the time that he made his application to purchase, whereby Johnson was to furnish Shannon the means with which to acquire his title, and that Shannon was to reimburse him by a conveyance of the land, or a division of the proceeds of a sale thereof.

We respectfully call the court's attention to the document entitled "Witness Shannon, Further Examination," (Trans. page 282). This examination was held at the time that he made proof upon his ap-

plication to purchase. It appears from this examiation that the Register of the Local Land Office was undertaking to ascertain whether or not Shannon had entered into any prior agreements with any person, and it appears that the Register had particularly in mind a firm or company engaged in purchasing timber, known as Shevlin Clark Timber Co. A reading of this examination will convince the court that Register Dunn had in mind some rumor or some report that the applicant Shannon had entered into some agreement with some person, whereby he was to convey an interest in this land, when he acquired title from the government. One question is:

> Q. Have you not made a verbal agreement to convey one-half interest in this land after you get title to it?
>
> A. No.
>
> Q. How do you explain the fact that it has been reported in this office that you have made a verbal agreement to convey a half interest in this land after you get title to it?
>
> A. I don't understand it at all.

Taking into consideration the further facts which were before the officers of the Land Department that a man by the name of English had contested Shannon's entry, (Trans. page 88) and that a man by the name of Hamilton had also contested his entry, (Trans. page 89); that these two contests had been disposed of without a hearing and the records disclosing how they had been disposed of; and the ap-

pellant immediately acquiring title to this land; the efforts that appellant had made to get rid of the Shannon-McCarter agreement, as disclosed by the testimony of Mr. Dudley, by the preparation of the affidavit for McCarter to sign, (a copy of which is found at Transcript page 100, Exhibit "B") and the letter written by Lammers to R. E. McFarland, (Record page 284, plaintiff's Ex. No. 7) stating to McFarland upon what terms he, McCarter would be paid the $600.00, which Shannon told him, Lammers, to pay to McCarter, the letter written by F. M. Dudley to S. L. McFarland at St. Maries, Idaho, dated June 11, 1907, (Trans. page 286-287, Exhibit 1), we most respectfully submit that these officers were justified in exercising that careful supervision of proceedings in the Land Department, that the law imposes upon them, and which is recognized by the Supreme Court of the United States, in the cases of **Lee vs. Johnson** and **Bailey vs. Sanders, supra.**

We further most respectfully submit that the evidence of both Shannon and Johnson, given upon the contest, upon its face shows a disposition to falsify, and leaves an impression that they were not telling the truth, which is difficult to explain in language. We submit to your Honors that, as attorneys and as chancellors, you have, upon occasions been impressed by the conduct and testimony of a witness before you, or by an affidavit of a person used before you, that the witness or the affiant were not telling the truth, and at the same time the basis or

foundation of this impression would be hard to explain or describe in words. At times, perhaps, this impression amounts to a conviction, for which a reason can be readily assigned. On the other hand, it might amount to a mere suspicion, a suspicion impossible of an explanation that would direct the mind of another to the precise thing or things that aroused this suspicion, and thus it is with the testimony of the witnesses Shannon, Johnson, and Dudley that was given before the Register and Receiver of the Local Land Office upon the contest. As written in that record, it might not create more than a suspicion in the mind of a chancellor, whose impression is received solely and only from a reading of the manuscript, and at the same time the Register and Receiver before whom the witnesses personally appeared; with their personal knowledge of all of the circumstances surrounding Shannon's proof, when he personally appeared before them to make proof, under his application to purchase; his demeanor and conduct; the charges in the English and Hamilton contest; the proceedings upon these contests; the very fact, perhaps, that these two contests were dismissed, shortly before, or shortly after the purchase of this land from Johnson by the complainant, as the case may be, might have been convinced to a moral certainty that Shannon and Johnson, prior to the time he, Shannon, made his application to purchase, had entered into an agreement, prohibited by the terms of the Timber and Stone Act.

We ask that your Honors in reading the testimony of the witnesses, Shannon and ~~McCarter~~ Johnson, taken before the Register and Receiver, upon the Kinsolving contest, note how reluctant they were to say anything or to answer any questions asked by the attorney for the protestant, and how evasive they were when they did answer, and how willing they were to answer the questions propounded by the attorney for the appellant.

We call your Honors' attention to the testimony of Shannon, while a witness in the contest proceedings in the Local Land Office, (Trans. pages 58-59). On page 58 he tells us that he had money out on interest and could not get it from the party, and that the party that owed him was his brother at Columbia Falls, Montana, and on page 59 he tells us how his brother returned it to him.

Q. You say you had loaned this money to your brother?

A. Yes.

Q. How long had he had it?

A. Six or seven years, along about '95 to the present time, to the time I proved up, the 16th day of January, or about a month before that he returned it to me.

Q. Well, he had all this amount, didn't he?

A. Yes, more than that; he sent me $500.00,—five $100.00 bills in a common letter.

Q. Registered letter?

A. No sir.

Q. And that money you say you earned where?

A. I made the most of it in Montana, some of it in Washington.

We readily understand why John Shannon answered that way respecting the money with which he paid the government for the land in controversy. Johnson had advanced him the money; he, Shannon knew; Johnson knew; Lammers knew; and F. M. Dudley also knew that Shannon had not earned the money with which he had made this purchase; they also knew that the protestant, Kinsolving, would be able to prove that Shannon had not earned this money during the four or five years he had been living in and around the vicinity of Coeur d'Alene; they all knew that Kinsolving could prove his habits; that he was addicted to drink to that extent that he spent all of his earnings that way; they also knew that if he, Shannon, should testify that Johnson had advanced him, Shannon, the money with which to make this purchase that it would be evidence from which the officers of the Land Department could presume that they, Shannon and Johnson, had entered into an agreement or contract respecting the land, in violation of Subdivision 2 of the Act of June 3, 1878. They also knew that if he, Shannon, should say that his brother or any other person, had sent this money to him, Shannon, by registered letter, that he could be detected in his falsehood, if it were false, by an examination of the records of the proper postoffices, and

the only course for him, Shannon, to pursue was to say that he received the money from his brother, and the very fact that he volunteered the information that he had received five one hundred dollar bills in a common letter, leads us irresistibly to the conclusion that he had been coached by somebody to make that statement or that it had been explained to him that by making that statement he could not be detected in his perjury.

At the time that the appellant and its attorneys were taking the affidavits of Johnson and Shannon, and undertaking to procure an affidavit from William McCarter, as disclosed by the testimony of Mr. F. M. Dudley, (Trans. page 93-98), there was a reason for such action.

Until the decision of the Supreme Court of the United States, in the Williamson case, it had been the practice of the Land Department of the Department of the Interior, to require all persons who had made application to purchase public lands, under the Act of June 3, 1878, to make oath upon their final proof, to the same facts, with reference to agreements to sell or convey, that they were required to make in their application, and the Federal Courts of the Ninth Circuit were also holding that if the applicant, prior to the issuance of his certificate of purchase, had directly or indirectly made any agreement or contract, with any person or persons, by which the title he might acquire from the government should inure, in whole or in part, to the benefit of any person, other

than himself, such contract made void all proceedings before the Land Office, and was ground for cancelling his entry, or vacating or setting aside his patent, and made such person amenable to the courts, for the crime of perjury.

The transaction between the appellant and the several parties, Shannon, Johnson, and McCarter, refered to in the testimony of Mr. Dudley, were had on April 25, 1907, (Trans. page 105-107-112), and at that time the lumbermen who were purchasing timber lands, acquired by the individual under the Timber and Stone Act, and the attorneys throughout the Ninth Circuit, were accepting the interpretation of the Timber and Stone Act, made by the Land Department and our courts.

The Williamson case, which limited the agreements prohibited by the Timber and Stone Act, to those made prior to the making of application to purchase, and thus changing the rule of law theretofore followed by the courts of this Circuit and the Land Department, was decided by the Supreme Court on January 6, 1908, long after the transaction between the appellant and Shannon and Johnson.

In view of this fact, we do not hesitate to say that all of the efforts upon the part of the appellant, as disclosed by the testimony of Mr. F. M. Dudley, were for the purpose of giving to the transaction had between Shannon and Johnson, an appearance of validity under the interpretation of the Timber and

Stone Act, as accepted and followed at that time.

We further call the attention of the court to the testimony of Shannon, (Trans. page 79). Toward the bottom of the page the following questions are asked:

Q. Who negotiated the sale for you?

A. In what way?

Q. Between you and Mr. Lammers?

A. Mr. McLaren, I guess, made the sale.

On the next page is the testimony of Joseph H. Johnson, (Trans. page 80).

Q. Mr. Johnson, prior to April 25, 1907, did you give R. C. Lammers an option on this land in question?

A. No, sir, —yes, I did too, —no, I think I gave it to McLaren.

Q. Was that a written option?

A. Yes.

Q. Did you negotiate the sale of this land with Mr. Lammers?

A. No, sir.

Q. Who first approched you with reference to giving an option, if you know?

A. Mr. McLaren.

Q. And did you give McLaren at that time a written option?

A. Yes.

Q. Did you give anyone else a written option?

A. No, sir.

Then follows the cross examination by Mr. Dudley:

Q. I hand you Claimant's Exhibit 1 for identification; (this Exhibit is found at page 115 of the transcript); will you look at that and see if that refreshes your recollection any concerning the transaction?

A. Yes, that is all right, that was long before McLaren, wasn't it?

Q. I hand you protestant's Exhibit "C" for identification, (This exhibit is found at page 103 of the transcript) and ask you to examine that.

A. This is what they took from me to Lammers.

Q. I will ask you if prior to February 14th, 1907, you had given a power of attorney or option to Dan McLaren?

A. Yes.

Q. And after that expired, did you give this option April 17, to Roy C. Lammers, direct?

A. Yes, I must have given it to him; that is my signature all right, but I have forgotten what time it was I gave it to him.....

Q. Had Mr. Shannon told you to find a buyer for this land?

A. Yes, it was through his request that I give that that way; he requested it.

Q. And it was under this option of April 17, that the deal was finally closed, on April 25th?

A. Yes, sir.

Now taking into consideration the fact that McLaren had taken this option prior to February 17th, 1907, and that on February 14, 1907, he assigned the

same to Lammers for the consideration of $1.00; the further fact that neither Shannon nor Johnson, upon direct examination, could tell anything about the transaction, but upon cross examination by Mr. Dudley, who very adroitly indicated the answer desired by the manner in which he framed his questions, we are forced to the conclusion that Shannon knew nothing whatever about the transaction, and was merely a figurehead in the entire proceeding, and that Johnson was working in the interest of Lammers, if not under his immediate direction.

We now call the attention of your Honors to the entire testimony of Mr. F. M. Dudley, and we most respectfully submit that there was no necessity whatever for the preparation of all of the affidavits so carefully prepared by him, unless he was impressed by something that Shannon had made application to purchase this land for speculative purposes, and in violation of the provisions of the Act of June 3, 1878.

We admit that there is no serious objection to be made to a person securing the payment of money due him, by taking a deed to real estate. The practice is not uncommon, but in an ordinary business transaction if the mortgagor or grantor desires to sell and convey, and the mortgagee or grantee is willing to sell and convey, then a deed from each of them to the same grantee would convey to such grantee both the legal title, which is in the mortgagee, and the equitable title of redemption remaining in the mortgagor,

and it would not be necessary to prepare and record the affidavits which Mr. Dudley required and procured of Shannon and Johnson. Of course, Mr. Dudley says in his testimony that he did this out of an abundance of precaution, but what was this precaution taken against, if he and Mr. Lammers had no suspicion that the application of the entryman Shannon was made in bad faith, and for speculative purposes. This precaution which they exercised in this transaction was so out of the ordinary that in the mind of any reasonable man, it would excite a suspicion that they knew, or believed, at least, that there was something wrong with the application of the entryman Shannon.

Another question suggests itself strongly to our minds, and it undoubtedly influenced the officers of the Land Department in their consideration of this cause when before them, the affidavit of John Shannon, (Trans. page 104, Exhibit "D"), and the affidavit of Joseph H. Johnson, (Trans. page 106, Exhibit "E"), were each subscribed and sworn to on the 25th day of April, 1907. These affidavits were not recorded in the office of the Recorder of Shoshone County until the 7th day of August, 1907, (Trans. page 106-107) until after appellee Kinsolving had filed his notice of contest, which was July 16, 1907, (Trans. page 7).

Further, the testimony of Mr. Dudley, (Trans. page 95) is so remarkable that we quote therefrom:

"I know that Mr. Shannon told us that he owed

Mr. McCarter some $600.00, and there was some other items, I am not positive but I think there was a memorandum of the sums there. I concluded from Mr. Shannon's appearance that his memory was defective and it occurred to me as possible or probable, in view of the contract of record between Shannon and McCarter, that he might have made a contract of that kind and forgotten all about it, or that his signature might have been procured to the instrument at a time when he was under the influence of liquor, and he have no knowledge of the transaction. I then drew up, simply based on my suspicions as to what might be the facts of the case, the paper which has been marked Exhibit 'B' for identification, (Trans. page 100, Exhibit 'B') and gave it to Mr. Lammers with a request that he forward it to the attorney, or the gentleman who I understood was acting as the attorney for Mm. McCarter, Mr. R. E. McFarland, I think it was, but the statements made in that affidavit were made by him without any direct information on which to base the same. I stated simply what appeared to me might be a possible solution of the apparent discrepancy between Mr. Shannon's statement and affidavit and the existence of a contract between Shannon and McCarter on the record, if John Shannon was the same Shannon."

We respectfully submit that from the foregoing statement of Mr. Dudley, it cannot be successfully or conscientiously argued, that at the time Mr. Dudley did not recognize the written agreement between John Shannon and William McCarter, dated September 24, 1906, and recorded in the office of the County Recorder of Shoshone County, on January 21, 1907, as a contract or agreement in violation of the provisions of

the Timber and Stone Act, and that it was his endeavor, acting for Roy C. Lammers, or the appellant herein, to evade, if possible, the effect of that contract. We further respectfully submit that at this time in in the negotiations, Mr. Lammers should have stopped and investigated, had he been acting in good faith, or had he desired to have acted in good faith.

Mark now that Shannon had told them, Lammers and Dudley, that he owed William McCarter $600.00, and that he had not signed the agreement, dated September 24, 1906, and that such agreement was a forgery; they paid every other dollar which Shannon told them he owed, but they did not pay this $600.00, and Mr. Dudley advised Mr. Lammers to write to Mr. McCarter's attorney, Mr. R. E. McFarland, and Mr. Lammers did so write to Mr. McFarland, (Trans. page 284, Exhibit No. 7), a letter as follows:

"R. E. McFarland,
Coeur d'Alene, Idaho.
Dear Sir:

Herewith I hand you affidavit for Mr. McCartor to sign before a Notary. He can then place it in the bank, drawing on me through the Old National Bank of this city, for $600.00.

Yours truly,
ROY C. LAMMERS.

If these gentlemen, Mr. Lammers and Mr. Dudley, at that time had only the statement of John Shannon respecting this agreement between Shannon and McCarter, dated September 24, 1906, and if the right of McCarter thereunder appeared to them in the nature of a suspicion only, why did they write to Mr. Mc-

Farland, an attorney, instead of to Mr. McCarter, or why did they write at all? Why did they prepare any affidavit at all? Why did they not, before paying a dollar out upon this property, see Mr. McCarter, and have an understanding with him as to what he claimed under this written agreement, and if the claim of Mr. McCarter had shown that the agreement was in violation of the Act of June 3, 1878, then Mr. Lammers and Mr. Dudley should have dropped all connection with the transaction of purchase from either Shannon or Johnson, and then again, when Mr. McCarter did not sign the affidavit for this $600.00, and so advised his attorney, S. L. McFarland of St. Maries, Idaho, and when S. L. McFarland so informed Roy C. Lammers, and Mr. Lammers took Mr. McFarland's letter to Mr. Dudley, then Mr. Dudley wrote the letter, marked Protestant's Exhibit "I," (Trans. page 287):

"June 11, 1907.

S. L. McFarland, Esq.,
St. Maries, Idaho.

Dear Sir:

Mr. Roy C. Lammers has referred to us your letter of May 15, 1907, returning the affidavit prepared for William McCarter, stating that Mr. McCarter does not feel disposed to sign this, but is willing to give a quitclaim deed for this land. As Mr. McCarter has no interest in this land whatever, we do not care anything for a quitclaim deed from him, but must insist upon the affidavit, otherwise Mr. Lammers, under our instructions will retain the consideration for this land now in his hands until the patent is issued,

as the guarantee of title.

Yours truly,

Mr. Dudley's testimony in regard to this letter is found in the transcript at page 97 and98. See also the testimony of Mr. Dudley regarding Exhibit "B," the affidavit prepared by Mr. Dudley for William McCarter to sign, (Trans. page 97).

> Q. Now referring to Protestant's Exhibit "B" (the affidavit prepared for McCarter to sign) which you testified about and which you say you prepared, isn't it a fact that you sent this affidavit, or had it sent to McCarter, believing he would sign it if he received the $600.00?
>
> A. I sent it or had it sent to him believing that if it were true he would sign it.
>
> Q. Isn't it a fact that the affidavit was returned to you, as indicated in another of protestant's exhibits, and that you returned it a second time to him saying that you would not accept anything else than the signing of this affidavit?
>
> A. Mr. Lammers sometime, I won't say the exact date, brought to me the letter of May 15, 1907, marked "Protestant's Exhibit 'G' for identification." On June 11th, 1907, our firm answered that letter, and I have a carbon copy of the answer which states its contents.

If Mr. Dudley expected Mr. McCarter to sign this affidavit prepared by him, Dudley, if the statements therein contained were true, and if McCarter refused to sign the affidavit because it was untrue, but was willing to give a quitclaim deed for the land, and if Mr. Dudley believed that this contract, referred to in the affidavit, was nothing but a mortgage from

Shannon to McCarter, why did Mr. Dudley, in his letter insist that Mr. McCarter sign this affidavit, which he, McCarter was not disposed to sign, and why did he, Dudley, say that under his, Dudley's insructions, Mr. Lammers would retain the $600.00 due from Shannon to McCarter, unless McCarter sign the affidavit? Remembering now that he was willing to take a deed from Johnson, together with Johnson's affidavit, that the deed from Shannon to Johnson was simply a mortgage, but when McCarter offered him a quitclaim deed for the $600.00, which he, Dudley, knew Shannon was owing to McCarter, he refused such quitclaim deed, and why? Because it was not a title to the land which Mr. Dudley and Mr. Lammers wanted for the appellant; they wanted to make as much record as they possibly could to show that Shannon had not made application to purchase this land for speculative purposes.

We therefore, most respectfully submit that the conditions connected with and surrounding the transaction of the purchase of this land by Lammers were such that we are justified in saying that Shannon made application to purchase this land for speculative purposes; that Mr. Lammers knew this fact and that indirectly Mr. Lammers was the party with whom John Shannon was dealing when he made his application, in violation of the provisions of the Timber and Stone Act.

Returning now to Exhibit "H," (Trans. page 107) which is the abstract of title to this land, your Honors

will note that the first instrument shown is the agreement between Shannon and Wm. McCarter, which was recorded January 21, 1907, (Trans. page 108); the next is the deed from Shannon to Joseph H. Johnson, which was recorded January 22, 1907, (Trans. page 109); then follows the usual certificate to the abstract, of Stanley P. Fairweather, County Recorder, dated January 22, 1907, (Trans. page 110); then the abstract is continued, and we find that the assignent of the McLaren option was decorded March 11, 1907, (Trans. page 111);(the next instruments in the original Exhibit "H" are the affidavits of Shannon and Johnson, dated April 25th, 1907, and recorded August 7th, 1907. They are omitted from the record at this place as they with the date of record are shown at pages 104 and 106 of the transcript); the next is the Receiver's Receipt, issued to Shannon on January 16, 1907, and recorded August 7, 1907, (Trans. page 112); the next is the deed from Johnson to Lammers, dated April 25, 1907, recorded August 7, 1907, (Trans. page 112-113); next is the deed from Shannon to Lammers, bearing the same date and recorded the same date, (Trans. page 113-114); then following is a second certificate of Mr. Fairweather, County Recorder, under date of the 6th day of January, 1908.

If Mr. Lammers was acting in good faith, why were the affidavits and deeds, arising out of his purchase of this land, from Shannon, on April 25th, withheld from the public record of Shoshone County, until after July

6th, 1907, the day the Kinsolving affidavit of contest was filed.

The foregoing are only a part of the points or phases of the transaction had in connection with the efforts of appellant to acquire title to this land as disclosely by the record of the proceedings before the officers of the Land Department.

Beginning at page 13 of its brief, counsel for appellant argue at length the sufficiency of the contest affidavit filed by the appellee in the Local Land Office. The affidavit of contest contains this allegation:

> "On account of the matters and things above set forth, affiant alleges that said Timber and Stone Entry No. 2500, was made for speculative purposes and not for the sole and exclusive benefit of said applicant, John Shannon, and that said Shannon, by reason of his agreements and contracts, as aforesaid, did not receive the full consideration and value of said land." (Trans. page 9).

It is true that in the affidavit of contest, there is no direct allegation that Shannon had what is known as **prior agreement,** or had entered into an agreement with Johnson, with reference to this land, prior to the time he had made application to purchase. It is true, however, that evidence was introduced tending to show such agreement, and that the appellant was present and contested such issue, and it is also true that there is an allegation in the affidavit of contest that Shannon had entered into the written agreement with William McCarter on the 24th day of September, 1906, (Trans. page 8). We respectfully submit that

under the liberal rules of practice adopted by the Land Department the affidavit was sufficient.

Counsel for appellant, throughout their brief cling to the idea that fraud must be shown by direct or positive evidence or that it must be shown beyond reasonable doubt. This is not our understanding of the law controlling the question of the proof of fraud. It is true that the party alleging fraud, especially in the courts of justice, must establish fraud by the burden of proof, and that means nothing more or less than such proof as convinces the mind. On the other hand, positive proof of fraud must come from some party to the fraudulent transaction. As a consequence, in the great majority of cases, the party to a proceeding alleging fraud is met with the positive statement of all parties connected with the fraud, that there was no fraud, and as a result, in the majority of cases, a finding of fraud is always a conclusion from circumstantial evidence. The term fraud, in its legal significance, is not susceptible of a comprehensive definition, or a definition that will apply to all circumstances. Fraud is as much an emotion of the mind as it is an act. There can be no fraud without a fraudulent act coupled with a fraudulent intent. An act to amount to fraud must be done with an intention on the part of the actor to wrong, cheat, or deceive, with the intention that such act shall result to his benefit to the extent that it injures another. The fraud in the case at bar was the act of Shannon in making the application to purchase this land from the

Government, during the existence of a contract or agreement, whereby the title to a part of the land he was to procure, was to inure to the benefit of some other person.

Without the fear of successful contradiction, we say that at the time he made his application, to-wit: On the 26th day of September, 1906, he had entered into such an agreement with William McCarter. The agreement was in writing; was positive; was direct, and had been made with all of the formalities required for a conveyance of real estate.

It appears that the officers of the Land Department took the same view of this agreement that counsel for the appellant take, that is, that it was an agreement relating to an entry, and not to land. In this position we cannot concur, and we are at a loss to understand how or why the officers of the Land Department took this stand.

They found, however, from the financial, mental, and physical condition of Shannon, as disclosed by the testimony, and from all the facts and circumstances surrounding the making of Shannon's application, his proof, and his conduct subsequent to proof, and the issuance of the Receiver's Receipt to him, that he had entered into a prohibited agreement and that he had applied to purchase the land for speculative purposes.

We, therefore, most respectfully submit that the order of the lower court, sustaining the demurrer to the bill of complaint, and dismissing appellant's cause of action, should be affirmed.

If, however, this court should feel that the Bill should not have been dismissed upon the demurrer, and that the appellees should have been required to defend upon the merits, the evidence offered by appellees at the trial, considered with that before the officers of the Land Department, is amply sufficient to sustain the judgment dismissing the bill.

We have in the record an affidavit of Mr. Shannon, made on the 12th day of July, 1907, long before he testified in the proceedings upon the protest of the appellee Kinsolving. This affidavit was made by Shannon, at the request of a special agent of the Commissioner of the General Land Office, Mr. E. B. Caple, (Trans. page 285, Exhibit 1). The affidavit is short and to the point; it discloses in detail the things that were done in connection with Shannon's application to purchase the land in controversy on the 26th day of September, 1906. He tells us that his commutation proof on his homestead entry was rejected and on the same day he relinquished the homestead entry and filed a timber and stone cash entry, on the advice of Roy C. Lammers, the active agent of the appellant in connection with its attempted purchase of this land, and Joseph H. Johnson, to whom he gave a deed immediately after making his proof upon his application. He tells us also that Joseph H. Johnson agreed to furnish all the money he needed to file on the land, as a timber and stone entry, and pay the government for the land when he would offer proof. He says:

> "I went to Coeur d'Alene on the 20th day of December, 1906, fifteen days before I offered proof on the timber and stone entry, and I roomed at Joseph H. Johnson's hotel and saloon; said Joseph H. Johnson furnished me all the money I wanted, with the understanding or agreement that he was to get the land before I made proof on the above timber and stone entry. I made a deed to Johnson before I offered proof on the timber and stone and after I offered proof I stayed at the Johnson Hotel, and on the 25th of April I made a deed to Roy C. Lammers of Spokane, and deeded him the above timber and stone entry for the consideration of $8000.00."

And your Honors will note that this affidavit was sworn to by Shannon on the 12th day of July, 1907, and that the Kinsolving affidavit of contest was filed on the 16th day of July, 1907. He, Caples, fully explains his reason for not transmitting these documents to the Department or to the Commissioner of the General Land Office, because, after Kinsolving had prosecuted his contest to a cancellation of the entry, there was no use in transmitting the evidence he had collected to the Commissioner of the General Land Office. He, Caple, also says that he was present at the hearing of the contest but that he took no part therein, and did not let Kinsolving have the affidavit of Shannon. In this Mr. Caple was following the well known policy of the Department of the Interior, to not interfere in contests between litigants before the Land Department.

Mr. Caple was called as a witness upon the trial of the case in the lower court, and his testimony is

found at pages 248 and 249 of the record. In substance, he says:

> "I got this document (Defendant's Exhibit No. 1, Trans. page 285), which I have presented, on the Bank of the St. Maries River, while I was in the employ of the United States.....I didn't transmit it to the government. When Mr. Kinsolving filed his contest, it wasn't of any use to the government. The contest cancelled the entry, and that is all it was gotten for. I had it in my possession ever since I took it. I exercised my judgment about keeping it or transmitting it to the Department. There was no use in transmitting it to the Department after the entry was cancelled. I was not acting for anybody except the government, when I took it, I didn't have any business dealings with Kinsolving at the time.....I did not transmit any of them (the affidavits he took) because the entry was cancelled at a hearing. Contest was filed, it wasn't cancelled,. but I gave way for Mr. Kinsolving. Whenever there was a contest filed the government let the private individual contest the entry. I did not advise Mr. Kinsolving, I was waiting until after."

We now desire to call the attention of your Honors to the testimony of the Witness McCarter, and particularly that portion found on page 253 and 254, following "Redirect Examination."

The first talk I had with him after this written agreement was when he was turned down here and couldn't make final proof on his homestead.

> THE COURT—I think I will ask this question: When did you first have a conversation with Shannon about the matter of entering this

land or having entered it as a timber and stone claim?

A. Well, sir, it was the day that he was refused his final proof, or just a day or so later; I couldn't say for sure. I know we went to Spokane from here and back, and I can't recall now whether it was right at the time or right after we got back to St. Maries, but it was the next time I seen him after he had made his final proof, after he had recalled his homestead filing and filed a timber and stone on it, he said Roy Lammers had advised him to take a filing, to file a timber and stone claim on it, and I says to him, I says, "Johnnie, where does that put you and me?" and he says, "It will be just the same, Billy," he says, "It is all right," and I says, "Is Lammers going to carry this thing through with you?" and he says "No."

Witness proceeds: That was the first time an agreement was made that I should have an interest in the timber and stone claim. I was here when he failed to make his commuted homestead proof. I had a conversation with him that day about the timber and stone entry and we went to Spokane that night.

We contend that the testimony as a whole, shows that McCarter furnished the $250.00, location fee, to put Shannon upon this piece of land, as a homestead entryman, and undoubtedly up to the time he undertook to make his communted homestead proof, on the 25th day of September, 1906, McCarter had furnished him money enough to amount to at least $600.00, the sum he told Lammers and Dudley, on the 25th day of April, 1907, he owed McCarter. In con-

sideration of this amount, and expecting to acquire title under his commuted homestead proof, he made the agreement to convey one-half of the land to McCarter, as soon as he made his proof. When he failed to make commutation proof upon his homestead entry, he, Shannon, did not know what to do, and Roy C. Lammers advised him, Shannon, to make a timber and stone entry, and Johnson agreed to furnish him, Shannon, all the money he needed to file on the land as a Timber and Stone entry, and also to pay the United States for the land. As soon as McCarter learned this he has this conversation with Shannon as stated in the answer to his Honor's question, and the understanding between them then, and the promise of Shannon was, that the relations between Shannon and McCarter were to be just the same as they had been; the agreement between them, made on the 24th day of September, 1906, was to be carried out, and we say that this then certainly made the written agreement between them, dated September 24, 1906, operative as against the stone and timber entry, by a direct contract or agreement between them, and we are justified in the conclusion that Johnson agreed to furnish Shannon the necessary money to enable him to acquire title to the land in controversy, before he, Shannon, made his application to purchase, and that he, Johnson, made this promise upon Shannon's promise to give him, Johnson, an interest in the land, after he, Shannon, had acquired title from the government. We say we are justified in this conclusion,

because immediately after Shannon had made his proof on the 16th day of January, 1907, upon his application to purchase under the Timber and Stone entry, he, Johnson, procured a deed of the land from Shannon.

We now desire to call the attention of the court to the contention of counsel for appellant, that appellant is a bona fide purchaser of the lands and premises in controversy. We contend that, under the rule laid down in Hawley vs. Diller, supra, by this court, and the Supreme Court of the United States, there can be no bona fide purchaser of an equitable interest in land, and more particularly in land, the legal title of which is in the United States, but were the rule otherwise, the record shows that the appellant had notice of any claim which McCarter might make to this land in controversy, long prior to its negotations with Shannon and Johnson on April 25, 1907. Upon page 252 of the record is found the testimony of the witness William McCarter upon this point. This witness says:

> "I had a conversation with Roy C. Lammers in regard to this. I remember the time Mr. Shannon made proof upon his application under the Timber and Stone Act. The night before or the night he proved up on his timber and stone claim I had this conversation with Lammers; that took place on the street down here (in the city of Coeur d'Alene, Idaho). I met Roy and I says: 'You are going to buy the Shannon claim, are you?' And he says, 'yes,' and I said, 'I have filed a contract against that,' and he said, 'I can't do noth-

ing with that Billy; our attorneys say it don't amount to anything,' and I walked off and left him."

Roy C. Lammers was also a witness, and testified upon this point. On page 258 of the record, Mr. Lammers says:

"Mr. McCarter stated to me that he had an interest in the timber and stone claim of Mr. Shannon. He did call my attention to a written agreement. That conversation was just about as he stated it, he said that he had advanced Shannon some money, or Shannon owed him money, and that he had a claim of record showing an interest in that claim. That was after the time of proof or about the time he made proof. Mr. Dudley was our attorney at that time. We had a copy of the abstract made in Wallace and submitted it to Mr. Dudley. I stated to Mr. McCarter that Mr. Dudley considered his title of no consequence in the case. That was the contract or agreement that was referred to."

On page 259, under cross examination, this witness testifies:

"Before we purchased this land we had an abstract of title showing the Shannon-McCarter agreements and submitted it to Mr. Dudley."

We most respectfully submit that, if the appellant could become a bona fide holder of an equitable interest in this land, the legal title being in the government, the appellant long before it purchased the land, had not only constructive, but actual notice of McCarter's claim under the Shannon and McCarter agreement, shown in the record at page 98, Exhibit "A."

We assume that counsel will argue that this conversation took place about the time that he, Lammers, purchased the property but both Lammers and McCarter fix it as about the time he, Shannon, made proof under his Stone and Timber application, and we feel that it was before the 21st day of January, 1907, that McCarter and Lammers had this conversation, because it was undoubtedly the refusal of Lammers to recognize Mr. McCarter's agreement with Shannon that caused McCarter to have the same recorded. But, be that as it may, there can be no contention but that the agreement or understanding between Shannon and McCarter, that McCarter was to have an interest in this land, when Shannon acquired title to it from the government, and which was reduced to writing on the 24th day of September, 1906, was continued as between Shannon and McCarter right along up to the time that McCarter filed his written agreement, and the reason that Shannon did not carry out this agreement with McCarter, was because he had entered into a similar agreement with Johnson, and that all of these matters were known to Lammers, when he purchased the land from Shannon, and because Lammers and Dudley understood these conditions, they procured the affidavits from Shannon and Johnson, and undertook to procure the affidavit from McCarter, so that they would be in a position to show, in case it were necessary, that there was no agreement made by Shannon, prior to the time he made application to purchase this land on September 26, 1906, and

Mr. Lammers and Mr. Dudley were so active and so persistent intheir efforts, that we are forced to the conclusion that Mr. Lammers at least, knew all about the arrangements between Shannon and McCarter and Shannon and Johnson, if he was not directly interested in Mr. Johnson's agreement with Shannon; and by interest we mean that Mr. Johnson was acting for Mr. Lammers.

It has been argued, and will be pressed upon the court again, that because Shannon said there was no such prior agreement, and because Johnson said there was no prior agreement, and because Lammers said there was no prior agreement, and because there is no positive evidence of such prior agreement, that, of course, there could not have been any such prior agreement, but we most respectfully submit that if Johnson and Shannon did make such prior agreement, and if Lammers knew that they had made such prior agreement, then we would expect all of them to testify as they did, but if Lammers had no knowlerge or suspicion of any such prior agreement, in April, when he purchased this land, then why did he and his attorney take all of these precautionary steps to show by affidavit that the deed from Shannon to Johnson was a mortgage when it was absolutely impossible for either Johnson or Shannon to state how much this mortgage was given to secure, and with Shannon saying that the agreement between himself and McCarter was a forgery, why did Mr. Lammers and his attorney prepare the affidavit for McCarter to sign, without conferring

with Mr. McCarter and send it to him, as Mr. Dudley says in his testimony, expecting him to sign it if it stated the truth, and when Mr. McCarter informed Mr. Lammers that he would not sign it (presumably because it did not state the truth), but that he, McCarter, would give to him, Lammers, a quitclaim deed for the $600.00, why did Mr. Dudley insist that they would not take the quitclaim deed, which would convey any interest that McCarter held, if the agreement of September 24, 1906, was a mortgage, and why did he insist that McCarter sign this affidavit before he, Dudley, would permit his client, Mr. Lammers, to pay the $600.00.

If the court please, the entire transaction bears upon its face the stamp of fraud. The affidavits they filed, under the statutes of Idaho, were not entitled to record, and, consequently, they gave no notice to subsequent purchasers. If they were acting honestly, and in good faith, there was no necessity for these affidavits, because any time after Shannon had made his application to purchase, he had a right to arrange for the money necessary to make the payment, and he had a perfect right to agree to convey, and the instrument executed by him, conveying the legal title to Johnson, was operative as a deed of conveyance, if he, Shannon, sat quietly by and permitted him, Johnson, to convey the land to Lammers. The efforts of Lammers and his attorney, in connection with this transaction, were not made for the purpose of acquiring the legal title to the property, but were

made for the purpose of covering up some transaction, which they, and each of them, knew to exist, and which they, and each of them, felt affected Shannon's right to acquire title to the land in controversy, under the Timber and Stone Act; and the several officers of the Land Department were right when they held that Shannon had made his application to purchase for speculative purposes, and in violation of the provisions of the Act of June 3, 1878.

It will be argued by counsel for appellant that the testimony of Caple, and the affidavit which John Shannon made for Caple, and the testimony of William McCarter was inadmissible, for the reason that the trial court was limited in this suit to the testimony and evidence submitted to the officers of the Department of the Interior, upon the Kinsolving contest. Under such a rule, a court of equity could be the means of perpetrating a fraud upon the government, by permitting an applicant to purchase land under a timber and stone entry, in violation of the Act of June 3, 1878, and the present case is a good illustration of such an incident.

Kinsolving brought his contest, charging that Shannon had made application to purchase the land in controversy, for speculative purposes, and not for his own exclusive use and benefit; he charged that the unlawful or prohibited agreement was written between Shannon and McCarter, dated September 24, 1906. The officers of the Land Department took the position that this agreement between Shannon and McCarter ap-

plied to a homestead entry, and not to the application to purchase under the Timber and Stone Act, but did find from circumstantial evidence that a prohibited agreement existed between Shannon and Joseph H. Johnson, and thereupon cancelled Shannon's entry, and this circumstantial evidence was sufficient to convince every officer of the Land Department, and the Secretary of the Interior, that Shannon's entry was made for speculative purposes.

Now, if a court of equity is to be permitted to say that while this circumstantial evidence adduced before the Land Department, was sufficient to satisfy these officers, of the fraudulent intent of Shannon in making his application to purchase, it does not convince the court, then the defendant should be permitted to introduce more evidence in support of the charges contained in the contest affidavit, because otherwise, if the Shannon entry was in truth and in fact, subject to cancellation upon the merits, and the officers of the Land Department so found, and the court limits itself to the same evidence, and should not so find, then a court of equity would be perpetrating a fraud, or at least permitting a fraud to be practiced upon the government.

We admit that we have not found any adjudicated cases directly in point upon this proposition, but for the foregoing reasons we feel that the evidence is competent and material and should be considered by the court, if the court feels that it is entitled to consider the evidence at all.

We now desire to discuss briefly, the facts and circumstances surrounding the acquisition of the land in controversy by the defendant, the Milwaukee Lumber Company.

After the cancellation of the Shannon entry, a patent was issued by the Commissioner of the General Land Office, conveying the land to the Santa Fe Pacific Railroad Company, in lieu of land situated in the San Francisco Mountains Forest Reserve, in Arizona, belonging to and conveyed by the Santa Fe Pacific Railroad Company to the United States. This patent is Exhibit No. 5 in the record of testimony taken before the court. (Trans. page 272). The patent bears the endorsement that it was received in the United States Land Office, at Coeur d'Alene, on April 5, 1911. The company conveyed this land to the defendant, Milwaukee Lumber Company, on the 27th day of September, A. D., 1911, by deed, a copy of which is shown at page 262 of the Record, Exhibit 2.

It appears from the testimony of Mr. Herrick, president of the defendant, Milwaukee Lumber Company, that these negotiations were carried on with the defendant Kinsolving, as the attorney in fact of the Santa Fe Pacific Railroad Company. That the powers of attorney, authorizing Kinsolving to act for the Railroad Company and the United States patent to the Railroad Company, were exhibited to him. That the same were unrecorded, and that he had seen a telegram from the clerk and ex-officio Recorder of Shoshone County to the effect that this land in contro-

versy, and which he was buying, belonged to the Santa Fe Pacific Railroad Company, and that he instructed the secretary of the defendant, Milwaukee Lumber Company, to prepare and have executed the necessary papers to close up the transaction, as agreed upon between himself and Mr. Kinsolving. (Trans. page 254-256).

We respectfully submit that Mr. Herrick, in this transaction, exercised the ordinary diligence and precaution of the average business man.

The presumption would naturally be that the patent from the United States not having been recorded, there would be nothing of record in the Recorder's office, affecting the title, and it further showed its good faith in immediately filing the patent, the deed conveying the land, and the powers of attorney, under which the deed was executed, in the office of the Recorder of Shoshone County, and gave to the defendant, Kinsolving, the obligation of the Milwaukee Lumber Company, to pay the purchase price agreed upon. (Trans. page 261, Exhibit 1).

In the bill of complaint, the defendants, Kinsolving, and the Milwaukee Lumber Company, are charged with a conspiracy to defraud the appellant by this transaction, and we respectfully submit that there is not a scintilla of evidence in connection with this entire transaction to show any conspiracy or any attempt to defraud the appellant. As above shown, the patent was received in the Local Land Office on April 5, 1911; the patent is dated the 27th day of

March, 1911, and upon that date the appellant could have commenced this suit. The closing of the transaction between these appellees must have dragged along from the 15th day of September, the date of the deed, by which the Milwaukee Lumber Company acquired title, to the 27th day of September, the day of the acknowledgment of the execution of the deed by Kinsolving. Therefore, we most respectfully submit that the entire transaction shows upon its face that it was honest, bona fide and was not entered into pursuant to any conspiracy or desire to defraud the appellant. Mr. Herrick says that the reason the Milwaukee Lumber Company had not paid the consideration, according to the terms of its written agreement with Kinsolving (Complainant's Exhibit 1, Trans. page 261), was because the defendant, Milwaukee Lumber Company, had been charged with a conspiracy, and he did not feel like making the payment until the suit was decided, (Trans. page 256), but nevertheless, we submit that the Milwaukee Lumber Company is liable to Kinsolving, or the Santa Fe Pacific Railroad Company, whichever the case may be, regardless of the action of the court in this suit.

Without discussing in detail, we desire to call the attention of the court to the testimony of Mr. W. E. Cullen, despite the fact that the appellant, in its amended and supplemental bill has charged the defendant, Kinsolving, and the Milwaukee Lumber Company with a conspiracy to defraud the appellant, in the conveyance of the land in controversy by the

defendant, Kinsolving, to the defendant, Milwaukee Lumber Company, The witness, Cullen, testifies that one Braderick, an officer of the appellee, Milwaukee Lumber Company, had stated to him, Mr. Cullen, in a general conversation that he, Braderick, knew of the claim of the McGoldrick Lumber Company, to the lands in controversy, (Trans. page 240). This testimony is surprising when we consider that the appellee, Milwaukee Lumber Company, had been charged with fraud and conspiracy in this transaction, and the appellee, Milwaukee Lumber Company, in its answer had denied the charge and had alleged that the officers of the Company, including Mr. Braderick, had no knowledge whatever of the claim of the McGoldrick Lumber Company, or any other person.

We call particular attention to the testimony of Mr. Cullen, at page 240 of the transcript:

> "The conversation was I simply inquired generally of Mr. Braderick whether he knew of the claim of the McGoldrick Lumber Company to this property. He stated that he did, that he had examined into it before the purchase was made and had caused an examination to be made of the records, something like that."

On cross examination on page 241, this witness says:

> "I think I said I had some conversation with Herrick; my recollection as to that is somewhat uncertain because it was a general conversation with Mr. Herrick."

We now call attention to the testimony of the clerk

of the court, A. L. Richardson, found at page 257 of the record:

> "I am the clerk of this court. I keep a record of subpoenas issued in civil cases. Subpoenas were issued on Mr. Herrick and Mr. Norris on November 7th. Subpoena issued on Mr. Braderick on December 1st."

(This was after the day the case was set for trial, but the cause was not taken up by the court until later on the 2nd of December).

We now call attention of the court to the testimony of the Deputy United States Marshal, William Schuldt, found at page 257 of the record:

> "I am Deputy United States Marshal. I received a subpoena for A. V. Braderick in this case yesterday morning. I telephoned St. Maries to locate him, and made inquiries of Mr. Herrick here. I reported my failure to get Mr. Braderick to Mr. McCarthy, who handed me the subpoena, Mr. McCarthy of Mr. Gray's office. The date of the subpoena for Mr. Braderick is December 1st. I received a subpoena for Mr. Norris and Mr. Herrick; that has been returned.....I served Mr. Norris and Mr. Herrick on the 21st of November, 1913."

It is somewhat surprising to us that counsel for the complainant should have undertaken to have talked with Mr. Braderick, whom he knew was present in Coeur d'Alene at the time of the alleged conversation for the purpose of giving his testimony in this case, and it is more so, that the counsel as a witness should undertake to impress upon the court that Mr. Braderick had made admissions to him, knowing him to be an attorney for the complainant, so directly in con-

flict with the allegations of the answer of the appellee, Milwaukee Lumber Company, as exhibited in paragraph XXIX of the answer, (Trans. page 189), and we ask the court to note further that the conversation with Mr. Braderick was a **general conversation**, and that is the reason that he remembered it. The witness thinks that he had a conversation with Mr. Herrick, but his recollection as to that conversation is not good, because it was a **general conversation.**

Turning to the record of the testimony of the clerk and deputy marshal, who had to do with the subpoenas issued and served in this case, we find that the subpoena issued for Mr. Herrick and Mr. Norris was dated on November 7, and was served on November 21, and the witness, Mr. Cullen, had an uncertain recollection as to having talked with Mr. Herrick about the matter, and the subpoena for Mr. Braderick was not called for or issued until the day before the case was tried, and after the case had been set for trial. We are impressed with the thought that the conversation with Mr. Braderick was fixed at this time as a certainty, because Mr. Braderick was not present at the trial, and the appellees were unable to reach him to contradict the testimony of Mr. Cullen.

All issues of law involved herein having been so frequently before this court, and having been so thoroughly discussed by this court, upon appeals in other cases, we will not make any argument on the law or undertake to discuss any of the cases cited.

We, therefore, most respectfully submit that the lower court did not err in sustaining the demurrer of the defendants, Kinsolving and the Milwaukee Lumber Company, to complainant's bill of complaint, for the reasons that,

First: The complainant had a fair trial before the Land Department of the Department of the Interior upon the merits of its case upon issues of both law and fact, and that the judgment of the Department, is binding upon the trial court and upon this court.

Second: That the bill of complaint shows no misapplication of law to the facts found by the officers of the Land Department.

Third: That the only issue of law raised by the complainant in its bill of complaint is that the evidence before the officers of the Land Department in the Kinsolving contest or protest is insufficient to support the findings of fact made by the officers of the Land Department, to-wit: "That the application of the entryman, John Shannon, was made for speculative purposes," and that this court has no jurisdiction to review a decision of the United States Land Department on the ground that the evidence was insufficient or that only incompetent evidence was before it as the power of the Department to try questions of fact embraces the power to pass upon the weight of, the competency of, and the sufficiency of evidence.

If the demurrer is not sustained, then we respectfully submit that the testimony shows conclusively,

First: That the entryman Shannon made application to purchase this land in violation of the provisions of the act of June 3, 1878, by reason of the fact,

(a) He had, on the 24th day of September, 1906, two days before he made his application to purchase, entered into a written agreement to convey to McCarter, a one-half interest in the lands to which he was about to acquire title from the United States.

(b) After failing in his proof upon his commuted homestead entry, on the 25th day of September, 1906, on the advice of Roy C. Lammers, the agent of the complainant, and Joseph H. Johnson, his proposed grantee, he, Shannon, made his application to purchase and that prior to such application Johnson promised to furnish him the money therefor and to pay the United States for the land, and that in consideration of this promise Shannon agreed to give him, Johnson, an interest in the land, and consummated this agreement by conveying the land to Johnson on the 16th day of January, 1907, shortly after making proof.

Second: That by the written agreement between Shannon and McCarter, Shannon forfeited all rights to this particular tract of land.

Third: That under no rule of law is the complainant an innocent purchaser.

Fourth: That under the law and evidence adduced, the defendant, Milwaukee Lumber Company, is an

innocent purchaser or a purchaser without notice of any claim of the complainant.

Respectfully submitted,

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